American International Assurance Co Ltd v Koh Yen Bee (f)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-143 OF 2000

ABDUL HAMID MOHAMAD, MOHD SAARI AND MOHD NOOR AHMAD JJCA

16 AUGUST 2002

Agency *— Termination and death — Revocation — Agency agreement — Agreement provided for termination by giving the other party 15 days' written notice without giving any reason therefor — Whether termination clause valid — Whether agency contract was for a fixed period — Whether compensation payable for revocation of all agency contracts without sufficient cause or only in respect of agency contracts for fixed period — Whether reasonable notice need be given for revocation of all agency contracts or only in respect of agency contracts for fixed period — Contracts Act 1950 ss 158, 159*

Contract *— Estoppel — Estoppel by conduct — Whether appellant could be estopped from relying on cl 26(b) of the contract — Whether principles of natural justice applied*

Contract *— Termination — Right to terminate — Agency agreement — Agreement provided for termination by giving the other party 15 days' written notice without giving any reason therefor — Whether termination clause valid — Whether agency contract was for a fixed period — Whether compensation was payable for revocation of all agency contracts without sufficient cause or only in respect of agency contracts for fixed period — Whether reasonable notice need be given for revocation of all agency contracts or only in respect of agency contracts for fixed period — Contacts Act 1950 ss 158, 159*

The respondent was the appellant's insurance agent. The respondent's agency was terminated by the appellant pursuant to cl 26(b) of the agent's contract ('the contract'). Clause 26(b) provided that the contract may be terminated by either party without giving any reason therefor by giving to the other party 15 days' written notice. There was no indication that the contract was for any fixed period of time. The respondent was however required to sign a Schedule of Commissions ('the schedule') every year. The schedule fixed the rate of commissions payable to the respondent during the period of the schedule's subsistence. The respondent's contract was terminated following the termination of her husband's agency contract by the appellant. The respondent sued the appellant alleging that the termination of the contract was without sufficient cause, that the appellant had failed to give a reasonable notice of the termination, that the appellant had failed to disclose the reasons for the termination and that she had suffered loss and damage and had been deprived of her privileges, rights and benefits contained in the contract. The respondent claimed loss of earnings and loss of Agent's Provident Fund. The High Court gave judgment in the respondent's favour and awarded her RM3m for loss of earnings and RM20,804.17 for loss of the provident fund. The appellant appealed. The issues were whether cl 26(b) of the contract was inconsistent with ss 158 and 159 of the

Contracts Act 1950 ('the Act') and therefore not valid, in particular, whether the agreement may be terminated by giving 15 days' notice without giving any reasons; whether the rules of natural justice applied; whether the appellant could be estopped from relying on cl 26(b); and quantum. A

B

Held, allowing the appeal:

(1) (per **Abdul Hamid Mohamad JCA**) Under s 158 of the Act, where an agency contract was 'for any period of time', compensation must be made if the contract was revoked or renounced prior to the expiry of the period and without sufficient cause. The expression 'for any period of time' meant a fixed period of time. Accordingly, s 158 of the Act does not apply to all contracts of agency, but only to the contracts of agency for a fixed period of time (see pp 310I–311B). In this case, there was no indication that the contract was meant to be for any fixed period of time, thus s 158 of the Act was inapplicable. Hence, the issue of whether there was sufficient cause for the revocation or renunciation did not arise (see p 312A–B). Also, s 159 of the Act is not independent of s 158. As such, only in the case of a revocation and renunciation of an agency contract for a fixed period would reasonable notice be required to be given pursuant to s 159 (see p 312C). Since ss 158 and 159 of the Act did not apply, cl 26(b) of the contract was not void as being inconsistent with these provisions (see p 314B) C D E

(2) (per **Abdul Hamid Mohamad JCA**) The cause of action here was purely on a private contract and other principles like natural justice should not apply to a purely contractual relationship. Similarly, the audi alteram partem rule did not apply. This was a case concerning the exercise of private law rights under a private contract and did not concern a public body acting pursuant to the powers derived from an Act of Parliament. Further, the relationship between the appellant and the respondent was not that of an employer and employee (see pp 313G, 314E–F); *Lloyd v MacMahon* [1987] AC 625 distinguished. F G

(3) (per **Abdul Hamid Mohamad JCA**) There was no evidence that the respondent had entered into the contract in reliance upon the appellant's agreement to forbear exercising its rights under cl 26(b) of the contract. The facts of the present case did not justify the application of the doctrine of estoppel (see pp 315H, 317G). H

(4) (per **Abdul Hamid Mohamad JCA**) Even though the issue regarding the quantum of damages was academic in view of this court's decision on the issue of liability, a three month termination notice should be reasonable. The award of damages should then be arrived at by taking the respondent's average monthly income and multiply the same by three (see p 323A–B); *Sohrabji Dhunjibhoy Medora & Anor v The Oriental Government Security Assurance Co Ltd* AIR 1946 PC 6 not followed. I

(5) (per **Mohd Noor Ahmad JCA** dissenting) By necessary implication, the contract was to be continued for at least a year unless the schedule was revoked by the appellant. Clause 26(b) merely indicated that the agency was not permanent. Hence, although no fixed or definite term was stipulated in the contract, it implicitly provided for the continuance of the agency for a period of time until the schedule was revoked. Accordingly, ss 158 and 159 of the Act applied to the contract (see p 325G–H).

(6) (per **Mohd Noor Ahmad JCA** dissenting) The freedom to contract was not absolute but was subject to statute, in particular, the Act, unless the Act explicitly permitted the parties to contract out of it. The Act was enacted for the protection of persons who did not negotiate from a position of equal strength. There was nothing expressed in the Act which allowed the parties to waive their rights given by law in a contract. Hence, cl 26(b) of the contract, which merely spoke of the duration of the notice for termination but did not dispense with the requirement of sufficient cause for termination was questionable. Accordingly, cl 26(b) was void as it was inconsistent with ss 158 and 159 of the Act (see pp 324G, 325A–B); *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 followed. Thus, the appellant's revocation or renunciation of the contract in the instant case was without sufficient cause (see p 325H).

(7) (per **Mohd Noor Ahmad JCA** dissenting) As the respondent had been the appellant's agent for 11 years, the 15 day notice of termination was not reasonable. In view of the respondent's achievements in the service prior to the termination, a 12 month notice of termination was reasonable (see p 326A–B).

(8) (per **Mohd Noor Ahmad JCA**, concurring on the issue of quantum) It is settled law that the respondent must mitigate her loss. Here, she failed to do so. By her own choice after the termination she elected to be a homemaker. She did not even attempt to seek clerical or secretarial works or for employment as an insurance agent with another insurance company. Therefore, damages should be reduced by 50% (see p 326C–D).

[Bahasa Malaysia summary

Responden adalah ejen insurans perayu. Ejensi responden telah ditamatkan oleh perayu selaras dengan kl 26(b) kontrak ejen tersebut ('kontrak tersebut). Klausa 26(b) memperuntukkan bahawa kontrak tersebut boleh ditamatkan oleh mana-mana satu pihak tanpa memberikan sebarang alasan dengan memberikan notis bertulis 15 hari kepada pihak yang lain itu. Tiada apa yang menunjukkan bahawa kontrak tersebut adalah untuk sebarang tempoh masa yang ditetapkan. Namun, responden dikehendaki menandatangani satu jadual komisyen ('jadual tersebut') setiap tahun. Jadual tersebut

menetapkan kadar komisyen yang kena dibayar kepada responden ketika tempoh pengekalan jadual tersebut. Kontrak responden telah ditamatkan berikutan dengan penamatan kontrak ejensi suami beliau oleh perayu. Responden telah mendakwa perayu dengan mengatakan bahawa penamatan tersebut adalah tanpa sebab yang memadai, bahawa perayu gagal memberi notis penamatan yang munasabah, bahawa perayu gagal memberi alasan-alasan untuk penamatan tersebut dan beliau telah mengalami kerugian dan kerosakan dan telah hilang hak-hak istimewa, hak-hak dan faedah-faedah seperti di dalam kontrak tersebut. Responden menuntut kehilangan pendapatan dan kehilangan wang Kumpulan Wang Simpanan Ejen. Mahkamah Tinggi telah memberikan penghakiman kepada responden dan mengawardkan beliau RM3j kerana kehilangan pendapatan dan RM20,804.17 kerana kehilangan wang Kumpulan Wang Simpanan Ejen. Perayu telah merayu. Isu-isu adalah sama ada kl 26(b) kontrak tersebut melanggari peruntukan-peruntukan ss 158 dan 159 Akta Kontrak 1950 ('Akta tersebut') dan oleh itu tidak sah, iaitu, sama ada perjanjian boleh ditamatkan dengan memberi notis sebanyak 15 hari tanpa memberi sebarang alasan; sama ada kaedah-kaedah keadilan asasi terpakai; sama ada perayu boleh diestop daripada bergantung kepada kl 26(b); dan kuantum.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Abdul Hamid Mohamad HMR**) Di bawah s 158 Akta tersebut, di mana kontrak suatu ejensi adalah 'for any period of time', pampasan mestilah dibuat jika kontrak itu dibatalkan atau dilepaskan sebelum luputnya tempoh tersebut dan tanpa sebab yang memadai. Ungkapan 'for any period of time' bermaksud satu tempoh masa yang tetap. Sehubungan itu, s 158 Akta tersebut tidak terpakai kepada semua kontrak-kontrak ejensi, tetapi hanya kepada kontrak-kontrak ejensi untuk satu tempoh masa yang ditetapkan (lihat ms 310I–311B). Dalam kes semasa, tiada tanda menunjukkan kontrak tersebut adalah untuk sebarang tempoh masa yang tetap, oleh itu s 158 Akta tersebut tidak terpakai. Oleh itu, isu sama ada terdapatnya alasan yang cukup untuk pembatalan atau pelepasan tidak berbangkit (lihat ms 312A–B). Juga, s 159 Akta tersebut adalah saling berkait dengan s 158. Oleh itu, hanya dalam keadaan pembatalan atau pelepasan suatu kontrak ejensi bagi satu tempoh yang tetap akan memerlukan satu notis yang berpatutan diberi selaras dengan s 159 (lihat ms 312C). Oleh kerana ss 158 dan 159 Akta tersebut tidak terpakai, maka kl 26(b) kontrak tersebut tidak boleh menjadi tidak sah atas alasan melanggari peruntukan-peruntukan tersebut (lihat ms 314B).

(2) (oleh **Abdul Hamid Mohamad HMR**) Kausa tindakan di dalam tindakan ini adalah semata-mata atas satu kontrak persendirian dan prinsip-prinsip lain seperti keadilan asasi tidak seharusnya dipakai kepada satu perhubungan kontraktual semata-mata. Begitu juga, kaedah audi alteram partem tidak terpakai. Ini

merupakan kes berhubung dengan perlaksanaan hak undang-undang persendirian di bawah satu kontrak persendirian dan tidak berkait dengan sebuah badan awam yang bertindak selaras dengan kuasa-kuasa yang diperolehi daripada satu Akta Parlimen. Lagipun, perhubungan antara perayu dan responden bukan perhubungan antara majikan dan pekerja (lihat ms 313G, 314E–F); *Lloyd v MacMahon* [1987] AC 625 dibezakan.

(3) (oleh **Abdul Hamid Mohamad HMR**) Tiada keterangan bahawa responden telah memasuki kontrak tersebut dengan bergantung kepada persetujuan perayu untuk tidak melaksanakan haknya di bawah kl 26(b) kontrak tersebut. Fakta-fakta kes ini tidak menjustifikasikan pemakaian doktrin estopel (lihat ms 315H, 317G).

(4) (oleh **Abdul Hamid Mohamad HMR**) Meskipun isu mengenai kuantum gantirugi bersifat akademik memandangkan keputusan mahkamah ini mengenai isu liabiliti, notis penamatan selama tiga bulan adalah berpatutan. Award gantirugi sepatutnya dicapai dengan mengambil purata pendapatan bulanan responden dan mendarabnya dengan tiga (lihat ms 323A–B); *Sohrabji Dhunjibhoy Medora & Anor v The Oriental Government Security Assurance Co Ltd* AIR 1946 PC 6 tidak diikut.

(5) (oleh **Mohd Noor Ahmad HMR** menentang) Melalui implikasi yang perlu, kontrak tersebut haruslah diteruskan selama sekurang-kurangnya satu tahun kecuali jadual tersebut dibatalkan oleh perayu. Klausa 26(b) hanya menunjukkan bahawa ejensi tersebut bukannya tetap. Oleh itu, meskipun tiada terma yang tetap atau tepat ditetapkan di dalam kontrak tersebut, ianya secara tersirat telah memperuntukkan bagi penerusan ejensi tersebut bagi satu tempoh sehingga jadual tersebut dibatalkan. Sehubungan itu, ss 158 dan 159 Akta tersebut adalah terpakai kepada kontrak tersebut (lihat ms 325G–H).

(6) (oleh **Mohd Noor Ahmad HMR** menentang) Kebebasan untuk memasuki kontrak tidak mutlak tetapi adalah tertakluk kepada statut, khususnya Akta tersebut, kecuali Akta tersebut dengan jelasnya membenarkan pihak-pihak tersebut untuk mengkontrak di luarnya. Akta tersebut telah digubal untuk melindungi orang yang tidak berunding daripada kedudukan yang sama kuat. Tiada apa-apa yang dinyatakan di dalam Akta tersebut yang membenarkan pihak-pihak mengenepikan hak mereka yang telah diberikan oleh undang-undang di dalam sesuatu kontrak. Oleh itu, kl 26(b) kontrak tersebut, yang hanya memperkatakan tempoh masa notis penamatan tetapi tidak menyatakan bahawa alasan yang mencukupi diperlukan untuk penamatan, boleh dipersoalkan. Sehubungan itu, kl 26(b) tidak sah kerana tidak konsisten dengan ss 158 dan 159 Akta tersebut (lihat ms 324G, 325A–B); *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 diikut. Justeru itu, pembatalan atau pelepasan

kontrak oleh perayu di dalam kes ini adalah tanpa sebab yang memadai (lihat ms 325H). A

(7) (oleh **Mohd Noor Ahmad HMR** menentang) Oleh kerana responden telah menjadi ejen perayu selama 11 tahun, notis penamatan selama 15 hari tidak munasabah. Berdasarkan kepada pencapaian responden di dalam perkhidmatan tersebut sebelum penamatan itu, notis penamatan selama 12 bulan adalah munasabah (lihat ms 326A–B). B

(8) (oleh **Mohd Noor Ahmad HMR**, mempersetujui isu kuantum) Ia merupakan undang-undang bahawa responden dikehendaki mengurangkan kerugian beliau. Beliau gagal berbuat sedemikian dalam kes semasa. Beliau telah memilih untuk menjadi suri rumah setelah dipecatkan. Beliau juga tidak cuba mencari pekerjaan sebagai setiausaha atau sebagai ejen insurans dengan syarikat lain. Sehubungan itu, gantirugi tersebut haruslah dikurangkan sebanyak 50% (lihat ms 326C–D). C

D

Notes

For cases on revocation of agency, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 848–850.

For cases on estoppel by conduct, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2661–2666. E

For cases on right to terminate contracts, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3897–3900.

Cases referred to

A/S Awilco v Fulvia SpA di Navigazione [1981] 1 All ER 652 (refd) F

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Chan Chow Kian v International Trading Co [1969] 2 MLJ 223 (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196 (refd)

Dawsons Bank v Nippon Menkwa Kabushiki Kaisha LR 62 IA 100 (refd) G

Johnson & Anor v Moreton [1978] 3 All ER 37 (refd)

Koh Yen Bee (P) v American International Assurance Company Limited [2000] MLJU 190 (refd)

Landau & Sons v Ahmed Ayub AIR 1922 Sind 25 (refd) H

Lloyd v MacMahon [1987] AC 625 (distd)

Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (refd)

Mohamed Selan v PB Securities Sdn Bhd [1992] 1 MLJ 762 (refd)

Rookes v Barnard [1964] AC 129 (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (folld) I

Saad bin Marwi v Chan Hwan Hua & Anor [2001] 2 AMR 2010 (refd)

Sohrabji Dhunjibhoy Medora & Anor v The Oriental Government Security Life Assurance Co Ltd AIR 1946 PC 6 (not follld)
Syarikat Jaya v Star Publications (M) Bhd [1990] 1 MLJ 31 (refd)
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701; [1996] 2 AMR 2322 (refd)
WJ Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189 (refd)
Wong Pa Hock v American International Assurance Company Limited & Anor [2001] MLJU 688 (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Contracts Act 1950 ss 14, 158, 159, 199
Housing Developers (Control and Licensing) Rules 1970

Appeal from: Suit No 22–146–1995 (High Court, Johor Bahru)

V Sivaparanjothi (*S Rutheran, Ch'ng Kim Hock* and *Wong Kee Them* with him) (*V Siva and Partners*) for the appellant.

Dr Cyrus Das (*Ong Chee Yong* and *Ong Peck Ha* with him) (*Ong & Ong*) for the respondent.

Abdul Hamid Mohamad JCA: The appellant is an insurance company. The respondent was the appellant's insurance agent. The respondent's agency was terminated by the appellant. The respondent sued the appellant alleging that the termination letter dated 26 January 1995 was given in bad faith and/or was unlawful, unfair, unjust and/or in contravention of the rules of natural justice. It was alleged that the termination of the agent's contract dated 27 February 1992 by the appellant was without sufficient cause, that the appellant failed to give to the respondent a reasonable notice of the termination of the agent's contract, that the appellant had failed to disclose the reasons for the dismissal, and that she had suffered loss and damage and had been deprived of her rights, privileges and benefits contained in the agent's contract. She claimed loss of earnings, being the total of first year commission, general business commission, career benefits payment and other incomes from 1995 until the age of 65 years, calculated on a projected increase of 10%pa totalling RM9,720,000. She also claimed loss of Agent's Provident Fund totalling RM300,000. Of course, she also claimed interest and costs.

The learned judge gave judgment in her favour and awarded her RM3m for loss of earnings which was to be paid forthwith 'as she had suffered all these years while waiting for justice from this court'. The learned judge also awarded a sum of RM20,804.17 for loss of the Agent's Provident Fund. The learned judge also awarded interest of 8%pa on the pre-trial damages from the date of termination of the agent's contract until the date of judgment and 8% from the date of judgment until the date of full payment thereof.

The appellant appealed to this court. We gave our decision on 3 May 2002. It was a majority decision. My brother, Mohd Saari JCA and I were of the view that the appeal should be allowed. My brother Mohd Noor Ahmad JCA was of the view that the appeal 'on liability' should be dismissed but the appeal 'on quantum' should be allowed partly by reducing the damages to RM50,000.

Coming back to the facts. As said earlier, the respondent was an insurance agent of the appellant. The agency was governed by an agent's contract dated 27 February 1992.

The preamble to the agent's contract reads as follows:

> WITNESSETH: That the Agent is hereby authorized to procure and transmit to the Company applications for all forms of life assurance, group insurance, annuities and general insurance within the territory wherein the Company has the right to do business, and to collect and pay over to the Company first year and renewal premiums and on such business; all subject to the terms and conditions on the following pages hereof which the Agent has read which form part of this agreement, as fully, as if set forth over the signatures of the parties hereto.
>
> The Company agrees to pay and the Agent agrees to accept as full and complete remuneration for his services under this agreement commissions and incentives as specified in the Schedule of Commissions attached to and forming a part hereof, which schedule shall be subject to change or revocation at any time on written notice by the company.

Clause 24 reads as follows:

> (a) This written contract constitutes the whole agreement between the parties herein.
>
> (b) This agreement shall, unless the Company otherwise consents in writing, supersede, abrogate and annul any contract or relationship heretofore held by the Agent with the Company as agent, broker or otherwise but shall not affect any bond given thereunder. The provisions of this clause shall not apply to any existing agency leader's contract entered into between the Agent and the Company.

Clause 26(b) reads as follows:

> Subject to sooner termination of this agreement by the Company in accordance with cl 27 hereof this agreement may be terminated without giving any reason thereof.
>
> (b) By either party upon 15 day's notice in writing; ...

Clause 32 reads:

> Nothing contained herein shall be construed to create the relationship of employer and employee whether expressly or impliedly between the Company and the Agent.

The respondent had been an agent of the appellant since 28 December 1987. By a letter dated 26 January 1995, the appellant terminated the respondent's contract. The content of the letter reads as follows:

A Dear KOH YEN BEE

Re: TERMINATION OF AGENT'S CONTRACT

In accordance with cl 26(b) of your agent's contract signed between you and our company, we hereby give you fifteen (15) days notice effective from today to terminate the said contract.

B You are required to return to us immediately the following:

(1) agent's authorization card;

(2) application forms, brochures and other sales material and documents supplied to you by our company;

(3) condition binding receipt books.

C Yours faithfully,

Sgd. (Illegible)
LIM BOON KWEE
Manager — Agency Records Department

For the purpose of this judgment, we do not think it is necessary to D reproduce the subsequent correspondence between the parties.

The main issue is whether cl 26(b) of the agent's contract is valid, in particular, whether the agreement may be terminated by giving 15 days notice without giving any reasons.

Before embarking on the specific grounds, it is important to note that E the provision applies to both parties, not just the principal, ie the appellant. Just as the principal may, by giving a 15 day notice without giving any reason, terminate the agreement, the agent may do likewise. We do not know the practice or the norm in the insurance industry. That may well be the norm in the industry.

F However, in this case, where the agreement was terminated by the principal, the learned judge talked about the case as 'a classic case of a master flexing its muscles to show its might notwithstanding the innocence of its servant', 'outrageous behaviour of the appellant', 'a case pure and simple, of the big bullying the small, and the strong oppressing the weak ... an oppression which manifested its ugly head for every one to see', 'cruelty G and malice', 'inhumane conduct' and so on, and the agent is viewed as 'weak', 'innocent', 'simple', 'scapegoat' and so on and for all that, the agent must be compensated. What if the agent is the one who gives the 15 days' notice of termination of the agreement without giving any reasons? Would the position be reversed?

H *Sections 158 and 159 of the Contracts Act 1950*

We shall first deal with the issue whether cl 26(b) is inconsistent with ss 158 and 159 of the Contracts Act 1950. Indeed, it is only on this point that our views differ; the majority holds the view that ss 158 and 159 are not applicable whereas the minority holds the view that they are applicable.

I The two sections read as follows:

158 Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation

to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

159 Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

There appears to be only two decided cases in this country, both of the High Court, in which the two sections were considered. The first is *Chan Chow Kian v International Trading Co* [1969] 2 MLJ 223. In that case, the plaintiff brought an action for goods sold and delivered. The defendants counterclaimed that the plaintiff had unjustly and deliberately terminated his appointment as distributor of the goods. The plaintiff had terminated the agency because of late payments. The court held that on the facts, the plaintiff had sufficient cause to terminate the agency and therefore the counterclaim should be dismissed.

The first thing that should be noted is that in that case, the contract of agency was for a period of five years and it was terminated before the expiry of that period. In the circumstances of that case, it was perfectly right for the learned judge to apply s 158 even though he held that the plaintiff had sufficient cause to terminate the agency. Even then, that ground was considered on the assumption that there was a contract.

All that that case decides is that where there is a fixed period of time, in that case five years, s 158 applies. That is perfectly correct and we agree with it.

The next case is the case of *Wong Pa Hock v American International Assurance Company Limited & Anor* [2001] MLJU 688.

The facts of that case are quite similar to the facts in the present appeal. Indeed the defendants in both cases are the same. Clause 24(b) in that case is in pari materia with cl 26(b) in this case. Indeed the learned counsel for the plaintiff in that case relied on the judgment of the learned judge now under appeal. But the court in that case was asked to decide a preliminary issue whether the plaintiff was entitled to the rule of natural justice of being given reasons for the termination of the contract and the opportunity to be heard. In coming to the conclusion that he did, the learned judge, inter alia, considered the provisions of ss 158 and 159 of the Contracts Act 1950. He concluded that the two sections do not apply as the contract was not for a fixed period of time.

Indeed that is the issue that this court has to decide: is the agent's contract a contract for 'any period of time'? That depends on the meaning of the words 'any period of time'. Does it mean a fixed period of time?

Unfortunately, we find little assistance from established text books on the law of contract in Malaysia or even India, where the relevant provisions in their respective Contracts Acts are in pari materia.

The better way therefore is to read the two sections and interpret them. In substance, what s 158 says is that where an agency contract is 'for any period of time', one party must make compensation to the other 'for a

previous revocation or renunciation of the agency without sufficient cause'. In other words, if the contract is for any period of time, compensation must be made if the contract is revoked or renounced prior to the expiry of the period and without sufficient cause. If the revocation or renunciation is made with sufficient cause, no compensation need be made.

Do the words 'for any period of time' mean a fixed period of time? In our view, the answer is 'yes', and it cannot be otherwise. It is true that the word 'fixed' is not used, but the word 'period' itself must have a beginning and an end. Otherwise, it is not a 'period'. The *Concise Oxford Dictionary*, inter alia, gives the meaning of the word 'period' as 'a length or portion of time'. Thus for example, we talk about 'the period of limitation'. KJ Aiyar's *Judicial Dictionary* explains the 'period of limitation' as 'the period of years, months or days prescribed by law impassing limitation'.

Secondly, if s 158 applies to all contracts of agency, the words 'where there is an express or implied contract that the agency should be continued for any period of time' would have no meaning. The drafters might just as well say, 'where a contract of agency is revoked or renounced without sufficient cause, the principal must make compensation to the agent, or the agent to the principal, as the case may be'. It is said that this is a continuing contract and therefore the section applies. But, this is merely stressing the word 'continued' used in the section. But the word 'continued' is followed immediately by the words 'for any period of time'.

Thirdly, the section also talks of 'a previous revocation or renunciation'. The *Concise Oxford Dictionary* gives the meaning of 'previous' as 'coming before in time or order'. Something can only happen 'previous' to an event if the time of the happening of that event is definite or fixed.

On these grounds, we do not see how the section can be read to cover all contracts of agency, whether or not there is a fixed period of time. In our judgment, the words 'continued for any period of time', can only mean continued for a fixed or definite length of time, be it one year, one month or whatever. But there must be a beginning and an end, known to the contracting parties at the time of the contract.

Coming back to the facts of this case, the agent's contract was signed on 27 February 1992. Clause 1 provides that subject to the appellant's (company's) right to terminate the agreement as set out in the agreement, the agreement 'shall only be deemed to be valid and binding upon the appellant so long as the agent's Schedule of Commissions shall continue to subsist'. The Schedule of Commission is signed annually. The written contract constitutes the whole agreement between the parties — cl 24. The agreement becomes automatically terminated without prior notice to the agent if, inter alia, the Schedule Commissions ceases to subsist — cl 27.

We are unable to find any indication that the contract is meant to be for any fixed period of time, be it for one year or whatever. The only indication, perhaps, is that the Schedule of Commissions is to be signed annually. But that Schedule of Commissions only fixes the rate of commissions payable during the period of the schedule's subsistence. That Schedule of

Commissions itself is subject to revocation or change and to the terms and conditions of the agents' contract.

In the circumstances, we are of the view that the agent's contract is not 'for any period of time,' meaning a fixed or definite period of time. Therefore, the provision of s 158 is not applicable. Therefore, it was not revoked or renounced 'previous' to the expiry of the period, as the period does not exist. Therefore the issue whether there was sufficient cause or not did not arise.

We now come to s 159.

In brief, s 159 says that reasonable notice must be given for such revocation or renunciation, otherwise the damage to the principal or agent must be made good.

The question is whether s 159 is independent of s 158 meaning that in all cases of revocations and renunciations, reasonable notice must be given otherwise the damage resulting thereby must be made good.

There appears to be two schools of thought amongst the High Courts in India, one says it is independent of s 158, the other says the opposite — see p 2204, *Pullock & Mulla: Indian Contract & Specific Relief Acts* (12th Ed) Vol II.

Again, we prefer to look at the section and interpret it. We are of the view that the words 'such revocation and renunciation' only refer to a revocation or renunciation under s 158. First, this section follows immediately after s 158. Secondly, there is no reason for the word 'such' to be used if it is not meant to refer to the revocation and renunciation mentioned in s 158. Thirdly, s 159 uses the very same words used in s 158 ie 'revocation and renunciation'.

The learned judge however, referred to *Mohamed Selan v PB Securities Sdn Bhd* [1992] 1 MLJ 762 and said (see *Koh Yen Bee (P) v American International Assurance Company Limited* [2000] MLJU 190 ('the MLJU report') at pp 58–59):

> It would be correct to say that the case of *Mohamed Selan* is authority for the following proposition: that notwithstanding the clause 'without assigning any reason whatsoever', a party suspending an agent's authority may 'intentionally and voluntarily abandon' the right not to give any reason and where he has given a reason, the court is entitled to examine that reason and decide whether on the reasons given, the principal's action to suspend the plaintiff's trading was justified under the circumstances.

Mohamed Selan is a judgment of the High Court. The plaintiff was engaged as a remisier by the defendant stockbrokers. The plaintiff then acted for a client in the sale of a certain shares quoted at the KLSE. It was later discovered that a large number of share certificates concerned had been reported stolen or missing. The client was paid for the shares on the very day that he had delivered the share certificates and transfer forms to the defendant, in contravention of the rules of KLSE. The defendant was required to buy other shares to replace some of the stolen shares and deliver them to the buyers. The defendant then suspended the plaintiff from

trading and gave reasons for its decision (although the agreement provided that no reason need be given for suspension), but on appeal, he was allowed to continue trading under certain conditions. The plaintiff prayed for various orders including a declaration that the suspension was null and void and damages.

Eusoff Chin J (as he then was), inter alia, held that the defendant had not exercised reasonable diligence in the performance of its duty, flouted the KLSE rules and had not taken reasonable precautions to prevent the receipt of stolen share scripts from the client, that the losses suffered by the defendant were through its own negligence.

The learned judge (as he then was) in that case said at p 774:

> It is, therefore, clear that the defendant, knowing and being fully aware of its rights under cl 4 of the remisier's agreement to suspend the plaintiff 'without assigning any reason whatsoever', intentionally or voluntarily abandoned that right when it gave its reasons for suspending the plaintiff. In other words, the defendant had waived its rights not to give reasons for suspending the plaintiff from trading.
>
> Now that the defendant had chosen to give its reasons for suspending the plaintiff, the court is entitled to examine the reasons given, and to decide whether on the reasons given, the defendant's action to suspend the plaintiff from trading was justified under the circumstances. I have already made my findings that on the facts, the defendant had suffered the losses through its own negligence, and because of that it is not justified for the defendant to put the blame on the plaintiff, and to suspend him immediately from trading. Further, the defendant had no just cause to recover its losses suffered through its own negligence by deducting the amount of the losses from the security deposit of the plaintiff. Although the plaintiff had been wrongfully suspended by the defendant from trading, it will not be proper for this court to order the defendant to re-employ the plaintiff as its remisier on the principle that one man will not be compelled to employ another against his will. The plaintiff's remedy lies in damages.

It is this passage that the learned judge relied on in the present case.

We do not want to say whether *Mohamed Selan* was rightly or wrongly decided because an appeal to this court may still be pending.

In the present case, the cause of action is purely on a private contract. The issue is whether cl 26(b) is valid, under the law of contract. Other principles like natural justice, which is applicable to public bodies, should not be applied to a purely contractual relationship. Judges, who, by the nature of their job, always have natural justice in their minds, should be slow to extend such principles to the world of business. Business management should not be equated with administration of justice. Business, indeed the country's economy might grind to a halt if companies are expected to be run like a court of law.

The requirement that reasons must be given if applied to a private contract such as in this case, would work both ways. If, as in this case, a big company, the principal, is expected to adhere to the principles of natural justice when terminating a contract, failing which it is liable to pay damages even though the contract makes clear provision regarding it, the same

requirement should also apply to the agent when the agent seeks to terminate the same contract. Would the agent be required to provide grounds thereto (unless where ss 158 and 159 of the Contracts Act 1950 apply) and give the principal the right to be heard, failing which the termination is void and the agent has to continue to be an agent or pay damages?

In any event, the issue here is whether cl 26(b) is valid. If it is, then it is a complete answer to the termination of the contract pursuant thereto.

In the circumstances, we are of the view that since s 158 is not applicable, s 159 is also not applicable. Clause 26(b) of the agent's contract is not void as being inconsistent with the provisions of the two sections.

Natural justicem

The next issue is whether the audi alteram partem rule applies.

In the earlier part of the judgment, the learned judge, under the heading of 'Introduction', made the following remark (at p 7 of the MLJU report):

> Of crucial importance to this case would be the audi alteram partem rule: the rule requiring fair hearing. It seemed to me that AIA has not heard of this rule requiring fair hearing. Being an international American corporation, AIA threw this rule to the wind.

However, as we understand the judgment, the learned judge did not hold that the termination of the agents' contract was unlawful because a fair hearing was not given.

In any event, the question of giving a fair hearing does not arise at all in this case. As submitted by the learned counsel for the appellant, and we agree with him, this is a case of and concerning the exercise of private law rights under a private contract. It does not concern a public body acting pursuant to powers derived from an Act of Parliament. The relationship between the appellant and the respondent was purely a contractual relationship, not that of an employer and an employee. Clause 32 clearly provides so.

The case of *Lloyd v MacMahon* [1987] AC 625 relied on by the learned judge is a public law case. For the distinction between the powers of public authorities and those of private persons, see *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337, in particular the passage from *Administrative Law* (5th Ed) by Professor Sir William Wade, quoted by Edgar Joseph Jr FCJ.

Estoppel

Under the heading 'AIA must be estopped by their conduct from relying upon cl 26(b) of the agent's contract', the learned judge said (at p 46 of the MLJU report):

> ... Is it just that AIA should, in the light of its conduct, succeed in the action given the peculiar facts of the case? The answer would certainly be in the negative and the doctrine of estoppel would be vigorously applied in favour of the plaintiff.

A And again (at p 47 of the MLJU report):

> Having perused through the evidence with a toothcomb, I have no hesitation to hold that the circumstances of the conduct and behaviour of AIA were such that it would be wholly inequitable that AIA should be permitted to assert the applicability of cl 26(b) of the agent's contract dated 27 February 1992. This was part and parcel of my judgment and I so hold accordingly.

B

First, as pointed out by the learned counsel for the appellant, estoppel was never pleaded, nor particulars given, by the respondent.

The 'state of affairs' listed by the learned judge on which he 'vigorously' applied the doctrine by conduct are as follows:

C (1) the plaintiff was an innocent party;

(2) the plaintiff's agent's contract was terminated for the sole reason of her being married to Soh Chor Ann;

(3) the plaintiff was deprived of an opportunity of explaining why her contract should not be terminated;

D (4) the timing of the termination was done in bad taste; it suggested cruelty or malice; it suggested that AIA had acted rashly in instructing that the letter of termination be sent out just before Chinese New Year;

(5) that the defendant, AIA, is a large multinational corporation while the E plaintiff is a mere ordinary Malaysian citizen earning an honest living;

(6) AIA terminated the plaintiff's agent's contract in the belief, a false delusion, that they did not have to answer to the plaintiff; and

(7) AIA terminated the plaintiff's agent's contract in the belief, again a false delusion, that they did not have to account for their action in a F court of law.

As for the law, we would only quote a passage from the judgment of Lord Denning in *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, which was quoted with approval by Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] G 3 MLJ 331 at p 347:

> If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

H

We agree with the submission of the learned counsel for the appellant that there is no evidence that the appellant would forbear from exercising its rights under cl 26(b), nor was there any evidence that as a result of such a promise or representation and in reliance thereof, the respondent entered into the contract. On the other hand, evidence shows that about 120 such I notices were issued every month which clearly shows that the appellant was relying on cl 26(b) and it is very unlikely that there would be a special forbearance in respect of the respondent.

Furthermore, as pointed out by the learned counsel for the appellant, and we agree, that the effect of an estoppel is not to extinguish a right but merely to suspend it. The right can be resurrected through the issuance of notice. In the *Law of Contract* by GH Treitel, (9th Ed), the learned author says:

> The equitable doctrine, like the common law doctrine of waiver, does not extinguish, but only suspends, rights. In *Hughes v Metropolitan Ry* [(1876–77) 2 App Cas 439], the landlord was not forever prevented from enforcing the covenant: he could have enforced it on giving reasonable notice requiring the tenant to do the repairs. This aspect of the doctrine was stressed in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [[1954] 2 All ER 657], where a licence for the use of a patent provided that the licensees should pay 'compensation' if they manufactured more than a stated number of articles incorporating the patent. In 1942, the owners of the patent agreed to suspend the obligation to pay 'compensation' until a new agreement was made. They later gave notice to end the suspension. It was held that they were once again entitled to the payments after the expiry of a reasonable time from the giving of notice. The reason for this rule is that, in equity, the effect of the representation is to give the court a discretion to do what is equitable in all the circumstances; and in the cases just discussed, it would not be equitable (or in accordance with the intention of the parties) wholly to extinguish the representor's (or promisor's) rights.

The learned judge also purported to rely on the judgment of this court in *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 2 AMR 2322 (also in [1996] 1 MLJ 701) to use estoppel not as a shield but as a sword, and invoked the doctrine to estop the appellant from relying on cl 26(b).

To appreciate what Gopal Sri Ram JCA said in that case, we should first look at the facts of that case, which is aptly summarized in the headnote:

> The appellant's husband, H, had a Mareva injunction imposed on him. The appellant (wife) opened a current account with Public Bank; she says that she signed all the cheques in blank and handed the cheque book to her husband, who entered into a contract with the respondent stock brokers. H bought and sold shares through the respondent and all transactions were done in the wife's name as her name was on a purported written agreement. After the account went bad, the respondent sued the appellant for recovery of monies owed to them, amounting to RM275,000. The appellant said she did not know of H's actions; the respondent's application to strike out the appellant's defence and counterclaim was allowed by the trial judge. Hence this appeal.
>
> ...
>
> Held
>
> It would be inequitable and unjust for the appellant to now assert facts that contradict her earlier conduct as the undisputed facts reasonably support an inference that the respondent was influenced by the appellant's conduct to entertain the belief that the appellant had given H *carte blanche* to act on her behalf. Furthermore, the doctrine of estoppel applies to the facts of this case.

In his judgment, the learned judge of the Court of Appeal said at p 2325 (at p 706 of the MLJ report):

> This is a case where the wife, by her actings, would have led a reasonable man to believe that she had given her husband *carte blanche* to act on her behalf. The undisputed facts reasonably support an inference that the respondent was

A influenced by the conduct of the appellant to entertain such a belief. She cannot therefore now assert facts that would contradict her earlier conduct. That would be inequitable and therefore unjust. She must face the consequences of the series of events which she set in motion by acceding to the husband's plan. If it were otherwise, it would amount to our letting her off the hook for assisting in the intentional breach of an order of court. That B would, in our judgment, amount to condoning an attempt to subvert the machinery of justice. We will not tolerate such a result.

In our judgment, this appeal may quite satisfactorily be resolved by reference to the doctrine of estoppel. It is a flexible doctrine by which courts seek to do essential justice between litigating parties.

C The learned judge of the Court of Appeal then went on to say (at p 707 of the MLJ report):

> We would add that it is wrong to apply the maxim 'estoppel may be used as shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine *in this context* is that stated by Lord Russel of Killowen in *Dawsons Bank v* D *Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:
>
> > 'Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. E (Emphasis added.)

In other words, a plaintiff too may rely on estoppel, not as a cause of action, but for the purpose so clearly stated by Lord Russel of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100.

F In that case (*Teh Poh Wah*), the appellant (wife), having opened a bank account, signed all the cheques in blank and handed the cheque book to her husband (who was subjected to a Mareva injunction) who entered into a contract with the respondent, bought and sold shares through the respondent, all done in the wife's name. Only after the account went bad that she said she did not know of the husband's actions. Under the G circumstances, clearly estoppel applies against her. Otherwise, it would be inequitable and unjust that she be let off the hook for assisting the husband in his intentional breach of the Mareva injunction.

The facts of the present case do not justify the application of the doctrine of estoppel.

H The learned judge also held that the appellant was estopped by the agreed facts, para 6(c) to (d). We do not think we need to reproduce them. They are questions posed to the court, eg whether the termination was made in bad faith, unlawful, unfair, in breach of natural justice; whether it was without sufficient cause, whether a reasonable notice was given. These are questions for the court to decide based on the pleadings of the I respondent. Whether or not they are tabulated, the court would have to consider them anyway, as those are the grounds pleaded by the respondent for challenging the termination. They are not admitted facts. With respect,

we do not understand how they can be considered 'admitted facts' to found an estoppel against the appellant.

Effect of Addendum

Next, the learned judge held that even if the appellant could rely on cl 26(b), that clause had been varied or modified by the addendum to the agent's contract.

The addendum, dated 8 March 1994, says:

> If the Agent after terminating the agent's contract which he previously held with another life insurance company (hereinafter called 'the previous insurer') joins or had joined the company, the Agent shall not within two (2) years from the termination date of his previous contract, divert to the Company any policy issued by the previous insurer. If the Agent commits a breach of this condition, the company shall terminate the agent's contract.
>
> Dated this 8th day of MARCH 1994

Again, with respect, we fail to see how this addendum modifies the provisions of cl 26(b). An addendum is clearly an addition or a supplement. It is meant to prevent unfair business practice of 'pinching' the business from an agent's former principal. The addendum signed by the parties here is not even in the interest of the appellant. It is, I believe, a rule made in the interest of the insurance business as a whole. Of course an agent who breaches it may have his agency terminated. If at all, it is an additional ground for the termination of the agency, in case of breach of the addendum. How or how else it modifies or varies the provision of cl 26(b), we are unable to understand.

The respondent herself in her evidence admitted in no uncertain terms that the addendum did not refer to cl 26(b). She then went on to explain what it meant and confirmed that it did not affect her as she did not work with another company before joining the appellant.

This ground is clearly misconceived.

Inequality of bargaining position

Even though the learned judge in his judgment repeatedly talked about 'the big' and 'the small', the 'master' and the 'servant', the 'strong' and the 'weak' and so on, he did not however deal with this ground separately. Neither did he conclude that cl 26(b) was void on the ground of inequality of bargaining position, coercion or undue influence. Perhaps the reason is understandable: the respondent did not plead this ground in her statement of claim.

However, before us, more so in his written submission, the learned counsel for the respondent devoted one part under the heading 'The termination is invalid and an unconscionable exercise of contractual power'. He resorted to the word 'unconscionable' pleaded in para 6 of the statement of claim. He argued that the contractual power was 'exercised widely and in a willy-nilly fashion'. He argued that there was overwhelming evidence 'of the callows and unconscionable exercise of this power of termination'. They are that the appellant had no complaint personally against the respondent 'who was at all times an outstanding performer'. The

A only ground was the decision to terminate her husband's agency. It was argued that the appellant was 'able to take this high handed attitude because of the absolute power it had reserved for itself under cl 26(b)'.

First, it must be pointed out that it is wrong to say that cl 26(b) contains absolute powers of termination reserved by the appellant for itself. The B provision of cl 26(b) applies to both parties. Both the appellant and the respondent may resort to it. If and when the agent who resorts to it, is it also 'unconscionable'?

Learned counsel for the respondent relied heavily on the provision of s 3(1) of the Civil Law Act 1956 and the decision of this court in *Saad bin Marwi v Chan Hwan Hua & Anor* [2001] 2 AMR 2010. That case appears C to be the first case in this country in which the court applied the doctrine of inequality of bargaining power independently of the well-established doctrine of undue influence. In *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196, a case involving a solicitor and his client, where the word 'unconscionable' was used in passing, the issue was considered under the head of 'undue influence'. D

We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific provision of s 14 of the Contracts Act 1950 which only recognizes coercion, undue influence, E fraud, misrepresentation and mistake as factors that affect free consent. Secondly, the restrictive wording of s 3(1) of the Civil Law Act 1956, in particular, the opening words of that subsection, the cut-off date and the proviso thereto. Thirdly, the fact that the court by introducing such principles is in effect 'legislating' on substantive law with retrospective effect. Fourthly, the uncertainty of the law that it may cause. F

Be that as it may, there is a lot to be said for the decision of this court in *Saad* in view of the facts therein and the justice that the court should do. *Saad* is a very clear case where a farmer whose earnings came, partly, from collecting coconuts. He had two pieces of land the value of which, as accepted by the High Court, was about RM2.4m. Yet, the respondent, G undoubtedly one of those unscrupulous businessmen, got him to sign an agreement to sell the property to him for RM42,000. The agreement was in English which language was not understood by Saad. He was not represented by a lawyer. Even the so-called deposit of RM4,200 which was said to have been paid was never paid. It was set off against the rental of the coconut land of the respondent that he harvested. The contract imposed a H liability on Saad to apply for and obtain an indefeasible title within 12 months of the agreement, something which is almost impossible for him to do. Even if he could, the legal fees would have left him with nothing. Indeed he might end up a debtor minus the land.

The facts of that case clearly supports such a decision if justice were to I prevail.

The facts of this case is nowhere similar to the facts in *Saad*. Here the respondent was an insurance agent. The contract was perfectly understood

by her. It was not a one-off contract, but was subsisting for about ten years and there was no complaint by her of the terms thereof. The clause which is now challenged is applicable to both parties. If it is not unconscionable to the appellant if she exercises that right, why should it be unconscionable to her when the appellant exercises that same right? A

In this kind of case, we think that the court should be slow to interfere with the freedom of the parties to contract unless it is contrary to the clear provisions of the law, in this case, in particular the Contracts Act 1950. Bearing in mind the tone of the judgment of the learned judge, the reminder by Lord Bridge of Harwich in *A/S Awilco v Fulvia SpA di Navigazione* [1981] 1 All ER 652 at p 659, may be useful: B

> The ideal at which the courts should aim, in construing such clauses, is to produce a result that in any given situation both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers *and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court.* (Emphasis added.) C

We are of the view that this ground too has no merits. D

On these grounds we are of the view that the appeal should be allowed with costs.

Quantum E

Even though, in view of our decision on liability, it would be academic for us to deal with the issue of quantum of damages, since there is an appeal and a dissenting judgment, it appears that we have to say something about it.

However, our job has been made easier because we have now had the advantage of reading the judgment of our brother Mohd Noor Ahmad JCA in draft on it. That saves us the necessity of discussing the judgment of the learned judge on the issue of damages at length. We agree with our brother Mohd Noor Ahmad JCA who disagreed with the approach taken by the learned judge and the award made by him for the reasons given by our brother Mohd Noor Ahmad JCA. F G

Unfortunately, and with respect, we also do not agree with our brother Mohd Noor Ahmad JCA who calculated the amount of damages based on one year's income less 50%.

In our view, if the provisions of ss 158 and/or 159 apply/applies and because of that the 15 day notice provided by cl 26 is void, being unreasonable, then the question is what is the reasonable notice? H

We were shown the case of *Sohrabji Dhunjibhoy Medora & Anor v The Oriental Government Security Life Assurance Co Ltd* AIR 1946 PC 6.

The facts and the decision of the Privy Council was aptly summarized thus: I

> A life insurance company appointed D as its Chief Agent for Gujerat. The letter of appointment dated 9 July 1892, contained the following paragraph:

A 'The agency would stand in the name of D & Co, but as already explained you alone would be our recognized agent and would be solely responsible. On your retiring or otherwise discontinuing the work the agency would cease and your partner would have absolutely no claim thereunder.'

Later on, on the suggestion of D, this paragraph was cancelled by the B company by a letter and D and two others were admitted as partners and recognized as agents working under the title of D & Co, but the other suggestion that the agency should last so long as the firm of D & Co stood was ignored. In 1917, on the death of D and other partners, the appellants who were D's sons were allowed by the company to come into the firm as partners in connexion with the agency. But nothing was said in the letter of C appointment about the duration of the agency. In 1939, the company terminated their agency by giving $3^1/_2$ months notice.

Held that, as the letter of 9 July 1892 showed, the original appointment was to last for the life time of D if he so long continued in business and it could not have been determined by notice. But in the absence of any reference in the correspondence to the duration of the agency of the appellants, the agency was D terminable by reasonable notice.

Held further that the notice of $3^1/_2$ months given by the company was inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up, and great expense incurred by the agents.

E Sir John Beaumont, delivering the judgment of the Privy Council said:

On the question as to what notice was reasonable, if their Lordships had agreed with the High Court upon the other questions at issue, they would have accepted without question the concurrent findings of fact that two years was a reasonable notice; nor must their Lordships be taken as dissenting from that view. But as the case will have to be remitted to the High Court for the F assessment of damages on the basis that the appellants have certain rights in relation to commission on renewal premiums after the termination of their contract, their Lordships think that the High Court should be free to reconsider the question of length of notice. The only opinion on the matter which their Lordships feel called upon to express is that the notice of $3^1/_2$ months given by the respondents was inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had G been built up and great expense incurred by the agents.

In our view, that case is not an authority that should be followed regarding the length of a reasonable notice. First, it is a 1945 judgment coming from the then India. We are talking about 21st century Malaysia. We doubt very much whether that authority is followed even in India now, what more in H England. Time and things certainly have changed over the past 57 years. Secondly, even the Privy Council had not finally decided that, in that case, the notice should be two years. The Committee left it to the High Court to reconsider the question of the length of notice. Thirdly, the original appointment was to last for life, a far cry from the terms agreed to by the parties in the present appeal. Fourthly, D was appointed a sole agent, I whereas in the present appeal, the respondent is one of the many, may be hundreds, who were terminated. We do not know how many agents terminated their agency during the same period.

Another case we think we should mention is *Syarikat Jaya v Star Publications (M) Bhd* [1990] 1 MLJ 31. It is a judgment of Edgar Joseph Jr J (as he then was). In that case, the defendants appointed the plaintiff sole agent for the sale of newspapers published by the defendant. The agreements were each for a period of three years but terminable after the first year upon, inter alia, three months' notice in writing. Regarding the issue of a reasonable notice of termination, the learned judge, considering the circumstances of the case as a whole, 'not forgetting the expedition and time spent by the plaintiffs and the desirability of a period of adjustment of business', held that six months would have been a reasonable period.

Again, it must be pointed out that the agent there was a sole agent and the contract period provided in the agreements was three years. So, in our view that case too is not an authority for the proposition that the reasonable notice for the termination of an agency, of whatever type, should be six months.

What then is a reasonable notice for the termination of an insurance agency contract at the present time?

Unfortunately, we do not have any evidence of the current practice in the industry. The fact that the impunged agreement states 15 days, the fact that about 120 agents are terminated every month by the appellant and the fact that there had not been any challenge prior to this case, seems to suggest that the accepted norm in the industry is that the period is much shorter than even six months.

We are of the view that the better way for the court to decide the issue is, first, to hear evidence of the practice in the industry as the decision may be detrimental, not only to the insurance companies but also the agents themselves and the industry. The period fixed by the court will not only bind future agreements but will also operate retrospectively on existing agreements (even Parliament does not usually make laws with retrospective effect). The period will bind both the insurance companies and the agents. If the period is too long, an insurance company genuinely wanting to terminate an unproductive and uncooperative agent may be jeopardized. Similarly, an agent who cannot make ends meet as an agent of a particular insurance company, may have to remain with the company until the period expires.

The fact that the law does not fix a definite period for such notice of termination shows that circumstances may be different from one type of agency and the other, from one industry to another.

It is no answer, we think, to say that each case should be decided on the facts and in the circumstances of that particular case. The principals and the agents would want to know what is the reasonable length of notice to be stipulated in future agreements. Otherwise there would be no certainty that a period believed to be reasonable by both parties at the time the contract was executed, agreed to by both parties, would be upheld by the court much later, and with retrospective effect. The judgment of the High Court in this case has given rise to, at least, one similar suit already.

In short, the judgment of the court, in fixing such a period, should not be guesswork. The test of what 'a reasonable man' thinks is reasonable does not help either, if though 'the reasonable man' is reasonable, he is ignorant

of the practice in the industry and the implications of his opinion. A principle of law should not be born out of ignorance. That is why in our view the practice in the industry is a factor that should be considered.

But, if, in spite of our shortcomings, our view is required, on the facts of this case, we are of the view that a notice of three months should be reasonable. The award of damages should then be arrived at by taking the average income per month multiplied by three months, making a total of about RM25,000. We would grant that amount if we have to make our decision on it.

Mohd Noor Ahmad JCA: The appellant appealed against the decision of Abdul Malik Ishak J who gave judgment in favour of the respondent with costs and awarded RM3m in damages for loss of earnings, more in the form of aggravated and exemplary damages and RM20,804.17 for loss of Agent's Provident Fund contributions, with interest at 8%pa on the pre-trial damages from the date of the termination of the agent's contract ('the contract') until the date of judgment and at 8%pa on the judgment sum from the date of judgment until realization. My learned brothers in the coram allowed the appeal with costs here and below. However, I differed only on the issue of non-applicability of ss 158 and 159 of the Act as held by them. Hence, I would dismiss the appeal on liability but allow the appeal on quantum and award damages in the sum of RM50,000 with interests at 8%pa from the date of filing of the writ until full settlement. I would also award the appellant half of the costs here and below. I now proceed to give my reasons.

The facts are straightforward. As the facts are sufficiently stated in the majority judgment, suffice for me to summarize them. Under the contract, the respondent was employed by the appellant as its insurance agent since 1984. The appellant also employed the respondent's husband as such agent. On 26 January 1995, the appellant terminated the respondent's employment without assigning any reason for the termination on 15 days notice in writing, purportedly under cl 26(b) of the contract. It was revealed at the trial that the contract had to be terminated by the appellant on policy or guideline considerations as her husband's contract had been terminated by reason of an offending telephone call allegedly made by her husband to RJ Barth, the then general manager of the appellant.

The learned judge made the following relevant findings of facts and conclusions:

(1) prior to the termination, the respondent had a glowing and an unblemished record of service with the appellant;

(2) the contract was to be continued for a period of time. It was to be construed and governed by the laws in force in Malaysia (cl 37 of the February 1992 contract). Hence, the provisions of ss 158 and 159 of the Act applied;

(3) clause 26(b) of the contract which does not require the giving of any reason for termination is inconsistent with s 158 of the Act which stipulates for sufficient cause to be given for the termination. The clause which requires the giving of only a 15 day notice in writing for

the termination is also inconsistent with s 159 of the Act which mandates the giving of reasonable notice. Both sections must be read conjunctively which entails that both sufficient cause and reasonable notice are required for the termination to be lawful. The notice of termination dated 26 January 1995 did not state any reason for termination. Further, the alleged policy or guidelines of the appellant on the termination could not be believed as it was not put in writing. Under the alleged policy or guidelines, where both the husband and wife held separate contracts with the appellant, when the husband's contract was terminated, the wife's contract had to be terminated. The reasons for the policy or guidelines are that the appellant did not want either spouse to have anything further to do with the appellant's business because the husband after his contract was terminated might carry on with the appellant's business by putting the policies under the wife's contract if the wife's contract was not terminated and the husband could create a lot of dissension within the appellant's organization since his own contract had been terminated. As the reason for the termination was not given and as the alleged policy or guidelines was or were not believed, the learned judge concluded that the respondent's employment was terminated simply because she was/is the wife of another agent of the appellant. Hence, that was not sufficient cause for the termination. Further, having regard to the length of service the respondent had with the appellant the 15 days notice was not reasonable. Therefore, by reasons of the said inconsistencies, the insufficient cause and the unreasonable notice for the termination, the termination was unlawful, and hence, the respondent must be compensated by the appellant.

(4) At the time of the termination, the respondent was earning an income of about RM8,100 per month and she had put up about 11 years of service with the appellant. The respondent was also entitled to the Agent's Provident Fund's contributions solely contributed by the appellant.

I am in agreement with the learned judge on the findings of facts and the conclusions arrived at.

It is trite law that the freedom to contract is not absolute. It is subject to the statute, in particular the Act, unless in explicit language, the Act permits the parties to contract out of it. It is apt to quote what was said by Lord Hailsham in *Johnson & Anor v Moreton* [1978] 3 All ER 37 at p 49, which reads:

> The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength.
>
> The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament — as was attempted here — where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest.

To my mind, without any doubt whatsoever, the Act was enacted also for the protection of persons who do not negotiate from a position of equal strength. There is nothing expressed in the Act which allows the parties to waive their rights given by law, in the contract. Hence, cl 26(b) of the contract which merely speaks of the duration of the notice for termination but does not explicitly dispense with the requirement of sufficient cause for termination, is questionable. As both ss 158 and 159 of the Act must be read conjunctively, to my mind, the clause is void notwithstanding the addendum to the contract dated 8 March 1994. Anyway, the addendum is not relevant to the issue at hand. I am fortified in my view by the decision in the case of *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, where the then Federal Court held that a clause in the agreement which was inconsistent with the Housing Developers (Control and Licensing) Rules 1970 was void.

Under s 158 of the Act, where there is an express or implied contract that the agency should be continued for any period of time, if the agency is revoked or renunciated without sufficient cause, the principal must pay compensation to the agent and vice versa. And s 159 of the Act requires that reasonable notice must be given of such revocation or renunciation otherwise compensation must be paid. In my view, whether the contract of agency is to be continued for any period of time or otherwise will depend on the decision upon the facts of each case. By reason of the word 'any', the period of time need not necessarily be for a fixed or definite term only. The period of engagement can be expressed in any form so long it provides, either expressly or impliedly, for the continuance of the agency for a duration of time, for example, the continuance of the agency until the happening of an event. The probability of the existence of such an agreement where the duration is not for a fixed or definite term will depend on the custom of the trade and general circumstances of the business (see Kennedy JC in *Landau & Sons v Ahmed Ayub* AIR 1922 Sind 25, at p 29).

It is evidently clear from the facts that the contract was signed by the respondent practically every year, that is to say, renewed annually but subject to the subsistence of the Schedule of Commissions, which was modified practically every year, with a rider that either party might terminate it on a 15 day notice without assigning any reason. To my mind, by necessary implication, the contract was to be continued for at least a year unless the Schedule of Commissions was revoked by the appellant. The termination clause merely indicates that the agency was not permanent. That being the case, though no fixed or definite term was stipulated in the contract, it implicitly provides for the continuance of the agency for a period of time until the Schedule of Commissions is revoked. Therefore, the contract is governed by ss 158 and 159 of the Act.

As the respondent was penalized by reason of being the wife of another agent whose contract was terminated, it is without doubt that the revocation or renunciation of the agency by the appellant is without sufficient cause.

Further, having regard to the fact that the respondent had served the appellant for about 11 years, to my mind, the 15 day notice given is not reasonable. In *Sohrabji Dhunjibhoy Medora & Anor v The Oriental*

Government Security Life Assurance Co Ltd AIR 1946 PC 6 it was held that where an insurance agent had acted as agent for a long period of time (nearly 50 years) and had to maintain a large staff of canvassers, $3^1/_2$ months' notice was not reasonable, and that the notice ought to have been at least of two years in the circumstances. In my view, although the respondent had only 11 years of service with the appellant, having regard to the undisputed fact of her honoured achievements in the service prior to the termination which must necessarily be due to her diligence and establishment of good network of canvassers, 12 months' notice of termination would be reasonable. This is also in line with the practice of industrial tribunals in awarding compensation based on the formula of one month notice for each completed year of employment.

It is settled law that the respondent must mitigate her loss. Here, she failed to do so. By her own choice after the termination she elected to be a homemaker. She did not even attempt to seek for clerical or secretarial works or for employment as an insurance agent with another insurance company. Therefore, I would award her damages based on the following calculations:

RM8,100 (monthly income) x 12 months

= RM97,200 minus 50% for failure to mitigate

= RM48,600, rounded up to RM50,000.

With due respect, I do not agree with the computation made by the learned judge because he quantified the loss of earnings including the projected increase of annual income from 1995 until the respondent reaches the age of 65 years. This method of calculation is unrealistic because it would tantamount to establishing that the respondent's service with the appellant is guaranteed until she reaches the age of 65 years. Even for claims in fatal accident cases under the Civil Law Act 1956 such method is too generous and wrong. The same mistake lies in his calculation for loss of Agent's Provident Fund contributions. I would not make any award on it because having regard to the method of computation as prescribed by r 9 of the Rules for AIA Malaysian Agent's Provident Fund, any award made would be hypothetical. In respect of exemplary damages I would not make any award on it because the facts do not justify the making thereon. Such award is restricted to three categories, namely:

(1) oppressive, arbitrary or unconstitutional conduct by government servants;

(2) conduct calculated to result in profit to the defendant; and

(3) where expressedly authorized by statute.

(see *Rookes v Barnard* [1964] AC 129).

Appeal allowed.

Reported by Lim Lee Na